

**United States Small Business Administration
Office of Hearings and Appeals**

SIZE APPEAL OF:

J.E. McAmis, Inc.,

Appellant,

RE: Trade West Construction, Inc.

Appealed From
Size Determination No.

SBA No. SIZ-6132

Decided: December 14, 2021

APPEARANCES

Scott Vandegrift, Vice President, J.E. McAmis, Inc., Chico, California

Karl Dix, Jr., Esq., Garrett E. Miller, Esq., Smith, Currie & Hancock LLP, Atlanta, Georgia, for Trade West Construction, Inc.

DECISION

I. Introduction and Jurisdiction

On November 16, 2021, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area VI (Area Office) issued Size Determination No. 06-2022-012, dismissing a size protest filed by J.E. McAmis, Inc. (Appellant) against Trade West Construction, Inc. (Trade West). The Area Office found that the protest was untimely. On appeal, Appellant maintains that the Area Office erred in dismissing the protest. For the reasons discussed *infra*, the appeal is DENIED and the size determination is affirmed.

SBA's Office of Hearings and Appeals (OHA) decides size determination appeals under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. parts 121 and 134. Appellant filed the instant appeal within fifteen days after receiving the size determination, so the appeal is timely. 13 C.F.R. § 134.304(a). A timely appeal, however, “cannot cure an untimely protest.” *Size Appeal of Orion Mgmt., LLC*, SBA No. SIZ-5853, at 2 (2017).

II. Background

A. Solicitation and Protest

On July 28, 2021, the U.S. Army Corps of Engineers (USACE) issued Invitation for Bids (IFB) No. W9127N21B0022 for a jetty repair project at Coos Bay, Oregon. The Contracting Officer (CO) assigned North American Industry Classification System (NAICS) code 237990, Other Heavy and Civil Engineering Construction, with a corresponding size standard of \$39.5 million in average annual receipts. The IFB was not set aside or otherwise restricted to small businesses. Trade West and Appellant submitted timely bids.

On September 1, 2021, bids were opened and the CO announced that Trade West was the low bidder and apparent awardee. On November 4, 2021, Appellant filed a size protest against Trade West, alleging that Trade West is not small for the instant procurement due to affiliation with other firms. The CO forwarded the protest to the Area Office for review.

B. Size Determination

On November 16, 2021, the Area Office issued Size Determination No. 06-2022-012, dismissing Appellant's protest as untimely. (Size Determination at 1.) The Area Office explained that, pursuant to 13 C.F.R. § 121.1004(a)(1), Appellant had five business days from the date of bid opening to file any size protest. (*Id.* at 1-2.) The instant protest was filed on November 4, 2021, more than two months after bid opening. (*Id.* at 2.) Therefore, the protest was untimely. (*Id.*)

C. Appeal

On November 18, 2021, Appellant filed the instant appeal. Appellant maintains that its November 4, 2021, protest was timely because USACE disclosed additional information about the bids on November 3, 2021. (Appeal at 1.) Further, Appellant has not yet been provided a copy of the actual bid submitted by Trade West. (*Id.* at 2.) Appellant asserts that, if Appellant had filed its protest prior to receiving the additional information, the protest would have been rejected as premature. (*Id.* at 2-3.)

D. Trade West's Response

On December 8, 2021, Trade West responded to the appeal. Trade West urges that OHA should dismiss or deny the appeal. (Response at 1.)

Trade West argues that the Area Office correctly dismissed Appellant's size protest as untimely. (*Id.* at 5-6.) Bid opening occurred on September 1, 2021, so any protest was due by September 9, 2021. (*Id.* at 5.) Even if the protest were not untimely, the protest also was vague and could appropriately have been dismissed as nonspecific. (*Id.* at 7-8.) Trade West argues that the instant appeal is deficient, as Appellant “offers no support or coherent explanation” to substantiate the claim that a timely protest would have been premature. (*Id.* at 5.) In addition,

Appellant failed to serve a copy of the appeal to Trade West, and did not attach the requisite certificate of service. (*Id.* at 8.)

III. Discussion

A. Standard of Review

Appellant has the burden of proving, by a preponderance of the evidence, all elements of the appeal. Specifically, Appellant must prove the size determination is based upon a clear error of fact or law. 13 C.F.R. § 134.314. OHA will disturb an area office's size determination only if, after reviewing the record, the administrative judge has a definite and firm conviction that the area office erred in making its key findings of fact or law. *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 11 (2006).

B. Analysis

SBA regulations require that a size protest must be filed with the CO prior to the close of business on the 5th day after bid opening, exclusive of Saturdays, Sundays, and legal holidays. 13 C.F.R. § 121.1004(a)(1). An untimely protest must be dismissed. 13 C.F.R. § 121.1004(d). Here, bids were opened on September 1, 2021. Section II.A, *supra*. The five-day protest window therefore began on September 1, 2021, and the last day for a timely size protest was September 9, 2021. Appellant's size protest was not actually filed until November 4, 2021. *Id.* Accordingly, the Area Office correctly dismissed the protest as untimely.

On appeal, Appellant maintains that, if Appellant had filed its protest sooner, such a protest would have been less detailed and might have been rejected as premature. Section II.C, *supra*. It is well-settled law, however, that “notification of the awardee's identity is the event that starts the time for protest running, not the protestor's learning of the grounds for its protest.” *Size Appeal of Garco Constr., Inc.*, SBA No. SIZ-5308, at 3 (2011). Because Appellant knew, or should have known, that Trade West was the apparent awardee of this procurement as of September 1, 2021, Appellant was required to file any size protest within five business days thereafter, and could not delay on bringing a size protest until such time as Appellant discovered additional details about Trade West's bid.

IV. Conclusion

For the above reasons, I AFFIRM the Area Office's dismissal of the protest as untimely and DENY the instant appeal. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge